4. On April 14, 2005, while this petition was pending, the plan settled its claims against respondents. Notice of Settlement, Exh. 1. The Notice of Settlement was filed on April 22, 2005. Meanwhile, after the settlement was reached but before the Court was notified of it, the Court on April 18, 2005, requested the views of the United States. In later letters to the Court, respondents asserted that the settlement moots the claims at issue here and petitioner denied that assertion. Letter from Craig R. McClellan to the Supreme Court of the United States (May 4, 2005) (McClellan Letter); Letter from Desmond C. Lee to the Supreme Court of the United States (Apr. 26, 2005) (Lee Letter).

DISCUSSION

The court of appeals erred in concluding that petitioner's claim may not be brought under Section 502(a)(3) of ERISA and should therefore be dismissed. Because that issue is important and the court of appeals' decision conflicts with the decisions of other courts of appeals, review of the first question presented would be warranted in an appropriate case. In light of the settlement in this case, however, any dispute about the propriety of petitioner's Section 502(a)(3) action is now moot.[2] Review of the important Section 502(a)(3) ques-

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[2] There is also a question whether petitioner has standing to bring this action as a "participant, beneficiary, or fiduciary" authorized to sue under 29 U.S.C. 1132(a)(3). See *Local 159, 342, 343 & 344; United Assoc. Journeymen Training Trust Fund* v. *Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981-983 & n.3 (9th Cir. 1999) (plan that is not fiduciary has no standing), cert. denied, 528 U.S. 1156 (2000); *Pressroom Unions-Printers League Income Sec. Fund* v. *Continental Assurance Co.*, 700 F.2d 889, 892-893 & n.8 (2d Cir.) (plan that is not fiduciary has no standing and questioning whether plan can be a fiduciary), cert. denied, 464 U.S. 845 (1983); but see *Saramar Aluminum Co.* v. *Pension Plan for Employees of the Aluminum Indus.*, 782 F.2d 577, 581 (6th Cir. 1986) (plan has standing). Petitioner has not alleged in its complaint or amended complaint that it is a fiduciary, and the lower courts did not address the issue.

tion presented therefore should await another case. See, *e.g.*, *Sereboff* v. *Mid Atlantic Med. Servs., Inc.*, petition for cert. pending, No. 05-260 (filed Aug. 25, 2005).[3] The other two questions presented in the petition are also moot and in any event would not independently warrant certiorari. The petition for a writ of certiorari therefore should be denied.

1. a. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 221 (2002), this Court held that 29 U.S.C. 1132(a)(3) does not authorize "the imposition of personal liability on [plan participants or beneficiaries] for a contractual obligation to pay money" to reimburse a plan for plan-paid medical expenses. The Court reasoned that the "equitable relief" authorized by 29 U.S.C. 1132(a)(3) means "those categories of relief that were *typically* available in equity." 534 U.S. at 210. The relief sought in *Great-West* did not fall within Section 502(a)(3), the Court explained, because it sought, "in essence, to impose personal liability on [plan participants or beneficiaries] for a contractual obligation to pay money—relief that was not typically available in equity." *Ibid.*

The Court in *Great-West* rejected the argument that the petitioners in that case could go forward with their suit under Section 502(a)(3) "because they seek restitution, which they characterize as a form of equitable relief." 534 U.S. at 212. The Court explained that "a plaintiff could seek restitution *in*

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[3] The petition for a writ of certiorari in *Sereboff* presents the Section 502(a)(3) question. The respondent in *Sereboff* is a plan fiduciary entitled generally to bring an action under 29 U.S.C. 1132(a)(3). See note 2, *supra*. Although respondent in *Sereboff* originally waived its right to file a response to the certiorari petition, this Court requested on September 27, 2005, that a response be filed. Based on our review of the petition and the lower court decisions in *Sereboff*, it appears that *Sereboff* squarely presents the Section 502(a)(3) issue and would likely be an appropriate case in which this Court could resolve the conflict in the circuits.

equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. In *Great-West*, however, the proceeds of the tort settlement were "not in respondents' possession." *Id.* at 214. Accordingly, the Court concluded that the kind of restitution the petitioners sought in *Great-West* "is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents." *Ibid.*

This case picks up where *Great-West* left off. Despite the other factual similarities between the underlying reimbursement obligation in *Great-West* and the one here, there is one critical difference that should prove outcome-determinative under *Great-West*'s analysis. Petitioner's claim for reimbursement is equitable because it seeks "the imposition of a constructive trust or equitable lien *on particular property*." 534 U.S. at 214 (emphasis added). That property is the money the Vonderharrs or their attorneys received in settlement of the Vonderharrs' third-party tort claims. See Pet. App. 3a (plan document requires reimbursement "from the net proceeds" of a third-party tort settlement). The claims are not for legal reimbursement, because they target particular proceeds and do not seek "to impose personal liability on the defendant[s]." *Great-West*, 534 U.S. at 214.

Contrary to the Ninth Circuit's reasoning (Pet. App. 7a-9a), describing an action to enforce an ERISA plan's reimbursement provisions as "contractual" does not mean that all relief sought is legal rather than equitable. This Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes* v. *Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie* v. *Coxe*, 56 U.S.

415, 420 (1854). The same rationale applies here. The Vonderharrs' contractual obligation to reimburse petitioner out of their third-party recovery has created a lien on the funds recovered that can be enforced in a suit for equitable relief under 29 U.S.C. 1132(a)(3).

The Ninth Circuit further erred insofar as it concluded that a constructive trust is available in equity only if what it viewed as "the traditional requirements of fraud or wrongdoing are satisfied." Pet. App. 9a; see also *id* at 7a ("breach of fiduciary duty must be present"). As *Barnes, supra*, and *Wylie, supra*, establish, neither an equitable lien nor a constructive trust "is limited to cases of wrongdoing or dishonorable conduct by the defendant." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 602 (2d ed. 1993); see *id.* § 4.3(2), at 597 (constructive trust "is in no way limited to cases of wrongdoing"). This Court has explained that ERISA permits a court to impose a constructive trust based on a need to prevent unjust enrichment, irrespective of wrongdoing. *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000).

b. Since *Great-West*, the courts of appeals have divided on whether 29 U.S.C. 1132(a)(3) permits an action to recover plan-paid medical benefits in circumstances such as those presented here. Within the last three years, four courts of appeals have held that an action may be brought under Section 1132(a)(3) when the plaintiff seeks to recover specifically identifiable funds that belong in good conscience to the plan and are within the possession and control of the plan participant or beneficiary. See *Mid Atlantic Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 217-219 (4th Cir. 2005), petition for cert. pending, No. 05-260 (filed Aug. 25, 2005); *Administrative Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1121-1125 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefit Plan* v. *Ferrer, Poirot*

& Wansbrough, 354 F.3d 348, 355-358 (5th Cir. 2003), cert. denied, 519 U.S. 1072 (2004); *Administrative Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 686-688 (7th Cir. 2003), cert. denied, 124 S. Ct. 2904 (2004). Two other courts of appeals have recently held that Section 502(a)(3) does not permit a reimbursement action even if those conditions are met. See Pet. App. 8a (discussing *Westaff (USA), Inc.* v. *Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002), cert. denied, 537 U.S. 1111 (2003), and *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 645-649 (6th Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005)).[4]

The conflict is acknowledged, see, *e.g.*, *Mid Atlantic*, 407 F.3d at 219 n.7; *Willard*, 393 F.3d at 1125; *Qualchoice*, 367 F.3d at 645-646, and several courts of appeals have denied petitions for rehearing en banc on the issue. See Pet. App. 35a (decision below); *Varco*, 338 F.3d at 680; *Bombardier Aerospace Employee Welfare Benefit Plan* v. *Ferrer, Poirot & Wansbrough*, 89 Fed. Appx. 905 (5th Cir. 2004); see *Qualchoice*, 367 F.3d at 638. Accordingly, the conflict is unlikely to be resolved without this Court's review.[5]

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[4] Other courts of appeals have also expressly rejected the Ninth Circuit's requirement that fraud or similar wrongdoing must be shown. See *Qualchoice*, 367 F.3d at 649; *Bombardier*, 354 F.3d at 358-360.

[5] Petitioner cites (Pet. 9; Reply Br. 2 n.1) three further decisions as being in conflict with the Ninth Circuit's decision here. *Skretvedt* v. *E.I. DuPont de Nemours*, 372 F.3d 193 (3d Cir. 2004), held that interest on a delayed award of benefits is appropriate equitable relief under Section 502(a)(3) of ERISA because at the time of the divided bench "the constructive trust remedy typically would allow [the plaintiff], in equity, to force [the defendant] to disgorge the gain it received on his withheld benefits under a restitutionary theory." *Id.* at 214. Because the right to the interest on wrongly delayed benefits—as opposed to the benefits themselves—was not directly imposed by the plan itself, the court's reasoning in *Skretvedt* did not directly address the reimbursement question here. In *Gerosa* v. *Savasta & Co.*, 329 F.3d 317 (2d Cir.), cert. denied, 540 U.S. 967 and 1074 (2003), plan fiduciaries sued a

c. Review to resolve the conflict in the circuits would be warranted in an appropriate case, because a plan's ability to obtain reimbursement from a third-party recovery is an important issue for plans and their participants and beneficiaries. Recovering such funds helps plans control the costs of providing benefits to other participants and beneficiaries and precludes double recoveries by tort plaintiffs of medical expenses—first when the plan pays for them and then, again, in a tort suit or settlement. A rule that prohibits the plan's ability to recover, as in the Ninth Circuit, pressures plans either to increase premiums or reduce benefits. See Pet. 5 n.4 (citing a union trust fund's revised plan that limits benefits to a maximum of $2500 where a participant or beneficiary may recover from a third party for the illness or injury for which the fund pays benefits). Increasing premiums or reducing benefits may harm plan participants and beneficiaries who rely on plans to pay for medical treatment they need immediately after an injury or illness, whether or not a later recovery is possible from a third party.

d. This case, however, is not an appropriate vehicle for addressing the reimbursement issue for the straightforward reason that the April 14, 2005, settlement between petitioner and respondents makes the issue moot in this case. In the settlement, petitioner stated that it "does hereby release, acquit and fully discharge [respondents] from any and all

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negligent plan actuary seeking recovery of the costs the actuary's negligence had imposed on the plan. The Second Circuit held that, because "[t]he moneys sought" by the fiduciaries in that case "were never in [the actuary's] possession," *id.* at 321. the actuary "was never 'unjustly enriched,'" and accordingly "no restitution claim can lie against it." *Id.* at 322. Insofar as the decision suggests that, if the moneys sought *were* in the actuary's possession, the fiduciaries could have brought an action to recover the moneys under Section 502(a)(3), its reasoning is in conflict with the Ninth Circuit's result here. *Sackman* v. *Teaneck Nursing Ctr.*, 86 Fed. Appx. 483 (3d Cir. 2003), was an unpublished, nonprecedential decision.

claims, actions, causes of action, demands, rights, damages, costs, attorney's fees, expenses and compensation whatsoever, which [petitioner] has or which may hereafter accrue on account of [petitioner's] claim for reimbursement, subrogation or enforcement of any lien rights" resulting from injuries in the Vonderharrs' automobile accident. Notice of Settlement, Exh. 1 ¶ 1. Although respondents retain a right to litigate if the Court were to grant certiorari, the release is not contingent on the outcome of further litigation. See *id.* ¶ 3.B. ("In the event of any further litigation of the issues in this Action * * * the outcome of such litigation expressly will not affect the finality and validity of the instant Settlement Agreement and Release of All Claims."); cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 (1982) (contingent settlement does not moot case). Petitioner's release therefore moots the reimbursement issue in this case and, if certiorari were granted, presumably would lead this Court to dismiss the petition without reaching that issue. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997); *Dakota County* v. *Glidden*, 113 U.S. 222, 223-227 (1885) (dismissing case based on settlement despite objection).

None of the arguments in the April 26, 2005, letter to the Court is sufficient to defeat mootness. In that letter, petitioner argues that the settlement does not release all "parties," including a "Special Needs Trust" that "may have been created" pursuant to California Probate Code § 3604(b)(3) (West Supp. 2003) to receive proceeds from a tort settlement that are to be used for one of the Vonderharr children. Lee Letter at 1; cf. *Great West*, 534 U.S. at 220 (not deciding "whether petitioners could have obtained equitable relief against * * * the trustee of the Special Needs Trust"). Respondents' counsel states that "there is no *Special Needs Trust* and never has been." McClellan Letter at 1. In any event, a special needs trust is not among the parties to this

case, and the possible existence of a claim by petitioner against such a trust would not save *this case* from mootness. Moreover, the settlement, in releasing respondents "along with their *agents*, employees, *and assigns*," Notice of Settlement Agreement, Exh. 1 ¶ 1 (emphasis added), appears to release any claim that petitioner may have against any such trust.

Petitioner further asserts that a "collateral circumstances" rule applies, because the settlement keeps in place a judgment against the plan that will have collateral estoppel effects if not reversed. Lee Letter at 2. In some situations, the collateral consequences of a judgment may prevent mootness. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998) (discussing when collateral consequences of a criminal conviction can save a challenge to a conviction from mootness); cf. *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115 (1974) (settlement of a strike does not moot a request for a declaratory judgment on the validity of a state law allowing strikers to receive welfare benefits). Here, however, petitioner, by settling, "has voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Accordingly, petitioner must accept the collateral estoppel effect that the court of appeals' judgment may have in a case involving other parties. Cf. *id.* at 22-25 (court of appeals' judgments are vacated to preclude collateral estoppel effect when mootness results from happenstance, see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), but not when it results from a settlement).[6]

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[6] Petitioner also argues that this case fits within the "capable of repetition yet evading review" exception to mootness and that the "public importance" of the matter defeats mootness. Lee Letter at 1-2. The "capable of repetition yet evading review" doctrine generally requires a showing that "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or

2. The petition presents issues beyond the reimbursement question. Petitioner argues (Pet. 15) that certiorari should be granted to decide whether a dismissal of a reimbursement action is based on a lack of subject matter jurisdiction, such that it precludes the court of appeals' order to the district court to award attorney's fees on remand under Section 502(g) of ERISA. See Pet. App. 12a. Section 502(g) provides that in an ERISA action "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). Petitioner asserts (Pet. 15) that the Ninth Circuit "implicitly" held that it had jurisdiction because it held that the district court should award fees on remand. Pet. App. 13a. In petitioner's view (Pet. 15-16), that holding conflicts with published decisions of two other courts of appeals (citing *Bombardier*, 354 F.3d at 362, and *Varco*, 338 F.3d at 685).

Because petitioner's settlement resolves respondents' claims for attorney's fees, Notice of Settlement, Exh. 1 ¶ 2, the attorney's fee issue is moot. Even if it were not moot, however, further review of that issue would be unwarranted, because the court of appeals had jurisdiction to order the award of attorney's fees and there is no conflict in the courts of appeals on that issue.

a. Assuming that a holding that a district court lacked subject matter jurisdiction would preclude the court from awarding attorney's fees under Section 502(g), see *In re Knight*, 207 F.3d 1115, 1117 (9th Cir. 2000), no such holding

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expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer*, 523 U.S. at 17 (quoting earlier cases). Neither of those conditions is satisfied here, because respondents' failure to reimburse petitioner may easily have been the subject of a fully-litigated lawsuit and because it is very unlikely that the dispute would recur between these parties. The public importance of an issue, of course, does not override Article III's case-or-controversy requirement.

was reached or would have been warranted here. "It is firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate [*i.e.*, deprive a court of] subject-matter jurisdiction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Thus, jurisdiction is generally present if "the right of [the plaintiff] to recover * * * will be sustained if the laws of the United States are given one construction and will be defeated if they are given another * * *." *Ibid.* Applying that principle, courts of appeals have concluded that dismissal of a reimbursement action under Section 502(a)(3) of ERISA does not deprive a court of subject matter jurisdiction. See *Mid Atlantic*, 407 F.3d at 217 n.5; *Blue Cross & Blue Shield* v. *Sanders*, 138 F.3d 1347, 1351-1353 (11th Cir. 1998); *Health Cost Controls* v. *Skinner*, 44 F.3d 535, 536-538 (7th Cir. 1995). Instead, such a dismissal would be for failure to state a claim. *Mid Atlantic*, 407 F.3d at 217 n.5; *Skinner*, 44 F.3d at 537.

In this case, the district court had jurisdiction to consider the plan's claim for reimbursement under Section 502(a)(3) because, if the plan's interpretation of that provision were correct, it could obtain reimbursement. Given the conflict in the courts of appeals on that issue, the plan's interpretation was not "'wholly insubstantial and frivolous.'" *Steel Co.*, 523 U.S. at 89; see *Mid-Atlantic*, 407 F.3d at 217 n.5. Accordingly, the district court also had jurisdiction to consider whether to award attorney's fees under Section 502(g)(1) of ERISA, 29 U.S.C. 1132(g).

b. Petitioner notes (Pet. 15-16) that the Fifth Circuit in *Bombardier* and the Seventh Circuit in *Varco* phrased their discussion of the viability of the reimbursement claims in those cases in terms of the district court's "subject matter jurisdiction" over those claims. *Bombardier*, 354 F.3d at 362; *Varco*, 338 F.3d at 686. Those stray references to subject matter jurisdiction, however, reflect the realities that "the

question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action," *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951), and that courts "have been less than meticulous" in their use of "the term 'jurisdictional,'" *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). In any event, those observations made no difference to the outcome in either case. The end result in both cases was to allow a claim for reimbursement, with no need to consider the issue here concerning an award of attorney's fees against a party that *fails* to establish a right to reimbursement under Section 502(a)(3). Thus, neither court reached a considered holding that the district court would have lacked subject matter jurisdiction or the ability to award attorney's fees if it had denied the claims as seeking relief not available under ERISA.

For those reasons, there is no square conflict in the courts of appeals on whether a district court has authority to award attorney's fees under Section 502(g) of ERISA after finding that a reimbursement action does not lie under Section 502(a)(3). Indeed, even the Ninth Circuit in this case did not directly address the argument that the dismissal deprived the district court of subject matter jurisdiction and therefore of authority to award fees, see Pet. App. 12a-13a, and it is not clear whether that court, if it had addressed the issue, would have concluded that the dismissal here was for lack of subject matter jurisdiction or for failure to state a claim. Cf. *Reynolds Metals Co.* v. *Ellis*, 202 F.3d 1246, 1248 n.2 (9th Cir.) (dismissal of reimbursement claim "could be based either on lack of subject matter jurisdiction or on the merits"), cert. dismissed, 531 U.S. 1061 (2000). For those reasons, further review of the authority of the district court to award attorney's fees in this case would not be warranted, even if the case were not moot.

3. Petitioner also argues (Pet. 17-18) that the Ninth Circuit erred when it awarded attorney's fees under a rule that requires an award to a prevailing participant or beneficiary unless "special circumstances" make an award unjust, and that the "special circumstances" rule conflicts with the decisions of eight other courts of appeals. We agree that the Ninth Circuit erred in this case and that its articulation of the special circumstances standard conflicts with decisions of other courts of appeals that have rejected that standard. Certiorari is not warranted, however, because, as discussed above, the issue is moot in this case. Moreover, the practical consequences of the Ninth Circuit's standard are limited.

a. Section 502(g)(1) of ERISA provides that in an ERISA action "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). Courts of appeals, including the Ninth Circuit, have used a five-factor test to guide a court's discretion. See, *e.g.*, *Martin* v. *Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 969-970 (8th Cir. 2002) (en banc), cert. denied, 537 U.S. 1159 (2003); *Gray* v. *New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986), and cases cited. Those factors are: (1) the degree of bad faith or culpability of the losing party, (2) the ability of that party to personally satisfy an award of fees, (3) whether a fee award would deter other persons acting under similar circumstances, (4) the amount of benefit the action conferred on members of the plan, and (5) the relative merits of the parties' positions. See, *e.g.*, *Gray*, 792 F.2d at 257-258; *Hummell* v. *S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

Based on the premise that ERISA "is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans," the Ninth Circuit has additionally concluded that if a plan participant or beneficiary "prevails in his suit under [29 U.S.C.] § 1132 to enforce his

rights under his plan, [he] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1985) (internal quotation marks omitted). The Ninth Circuit considers it an abuse of discretion to deny attorney's fees to a prevailing participant or beneficiary in the absence of special circumstances. *McConnell* v. *MEBA Med. & Benefits Plan*, 778 F.2d 521, 525 (9th Cir. 1985).

Whatever the validity of a "special circumstances" test in a case where a participant or beneficiary prevails in a suit to obtain benefits from the plan, the test should not apply when, as here, a plan sues a participant or beneficiary to recover plan-paid medical expenses from a third-party tort recovery. As the district court recognized, ERISA "does not provide employees with a right to be free from a plan's reimbursement provision. * * * Consequently, by defending this action, [respondents] are not seeking to protect their rights under ERISA; they are seeking safe harbor in [the plan's] inability to obtain reimbursement." Pet. App. 18a. ERISA's purpose of protecting the interests of participants and beneficiaries by providing "ready access to the Federal courts," 29 U.S.C. 1001(b); see *Smith*, 746 F.2d at 589, is not implicated here because the plan, not a participant or beneficiary, is seeking such access. The statutory language, authorizing a discretionary award of attorney's fees "to either party," 29 U.S.C. 1132(g)(1), also does not otherwise suggest that one category of litigants should be treated more favorably than another group in cases of this sort. Cf. *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 522 (1994) (rejecting standard that ordinarily allowed prevailing plaintiffs but not prevailing defendants to recover attorney's fees under copyright statute's attorney's fee provision, 17 U.S.C. 505, which gave "no hint that successful plaintiffs are to be treated differently from successful defendants"). Accordingly, there is no basis for the

Ninth Circuit's use of the "special circumstances" test to require a fee award for respondents, some of whom are not even participants or beneficiaries. See Pet. App. 16a (attorneys, who were also sued, sought attorney's fees).

b. Eight courts of appeals have rejected a "special circumstances" or presumptive-award test for awarding attorney's fees under Section 502(g)(1) of ERISA. See *Martin*, 299 F.3d at 969-972 (citing cases).[7] Review to clarify the test for awarding attorney's fees would not be warranted here, however, even if this case were not moot, because it is not clear that whatever variation there is in the tests used by the courts has had significant practical consequences. As discussed above, all courts begin with the five-factor test. That test is open-ended and is sometimes applied to favor plan participants and beneficiaries. See *Gray*, 792 F.2d at 258-259. Additionally, some courts, like the Ninth Circuit, consider whether to award fees in light of ERISA's purpose of furthering the interests of participants and beneficiaries. See *Locher* v.

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[7] The Second and Tenth Circuits use the five-factor test but have not expressly rejected the "special circumstances" test. See *Locher* v. *Unum Life Ins. Co. of Am.*, 389 F.3d 288, 298 (2d Cir. 2004); *Eaves* v. *Penn*, 587 F.2d 453, 465 (10th Cir. 1978). The Seventh Circuit uses a "special circumstances" test that is derived from the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), which entitles a prevailing party to recover attorney's fees from the United States unless the government's position was substantially justified or special circumstances make an award unjust. *Bittner* v. *Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984). The Seventh Circuit's test creates "a modest presumption" in favor of awarding attorney's fees to a prevailing party, plaintiff or defendant, and "imparts flexibility to the standard [for awarding attorney's fees] and continuity with the cases that use a multi-factored approach." *Ibid.* That test and the multi-factor test are "simply alternative ways of making the same basic point: * * * 'was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?'" *Central States, S.E. & S.W. Areas Pension Fund* v. *Hunt Truck Lines, Inc.*, 272 F.3d 1000, 1004 (7th Cir. 2001) (internal quotation marks omitted), cert. denied, 536 U.S. 904 (2002).

Unum Life Ins. Co. of Am., 389 F.3d 288, 298 (2d Cir. 2004); *Nachwalter* v. *Christie*, 805 F.2d 956, 962 (11th Cir. 1986); *Gray*, 792 F.2d at 258-259; *Dennard* v. *Richards Group, Inc.*, 681 F.2d 306, 319 (5th Cir. 1982); cf. *Martin*, 299 F.3d at 972 (stating that "few, if any, fee awards have been denied a prevailing plaintiff in ERISA cases nationwide").

Moreover, it is not clear that the Ninth Circuit's test will be consistently applied to require plans to pay attorney's fees to a prevailing participant or beneficiary. Recently, that court has affirmed the denial of attorney's fees to a participant who prevailed against a plan in the plan's reimbursement action. *Honolulu Joint Apprenticeship & Training Comm.* v. *Foster*, 332 F.3d 1234, 1239-1240 (9th Cir. 2003). The court mentioned the "special circumstances" test, but did not consider it to be separate from the five-factor test or fault the district court's use of the five-factor test. *Ibid.* Future cases will be necessary to see whether the Ninth Circuit follows the *Honolulu* approach, which gives no special weight to the "special circumstances" test, or the approach taken by the panel here, which gives great weight to it. See also *Martin*, 537 U.S. 1159 (2003) (denying certiorari in a case raising the same attorney's fee issue that is presented here).

c. Finally, in *Martin* v. *Franklin Capital Corp.*, cert. granted, No. 04-1140 (to be argued Nov. 8, 2005), this Court will consider the standard governing the award of fees under 28 U.S.C. 1447(c), which provides that an order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." It is possible that this Court's decision in *Martin* v. *Franklin Capital* will affect the correct understanding of the standards governing the award of attorney's fees under ERISA Section 502(g)(1). Accordingly, further review of this issue before *Martin* v. *Franklin Capital* is decided would in any event be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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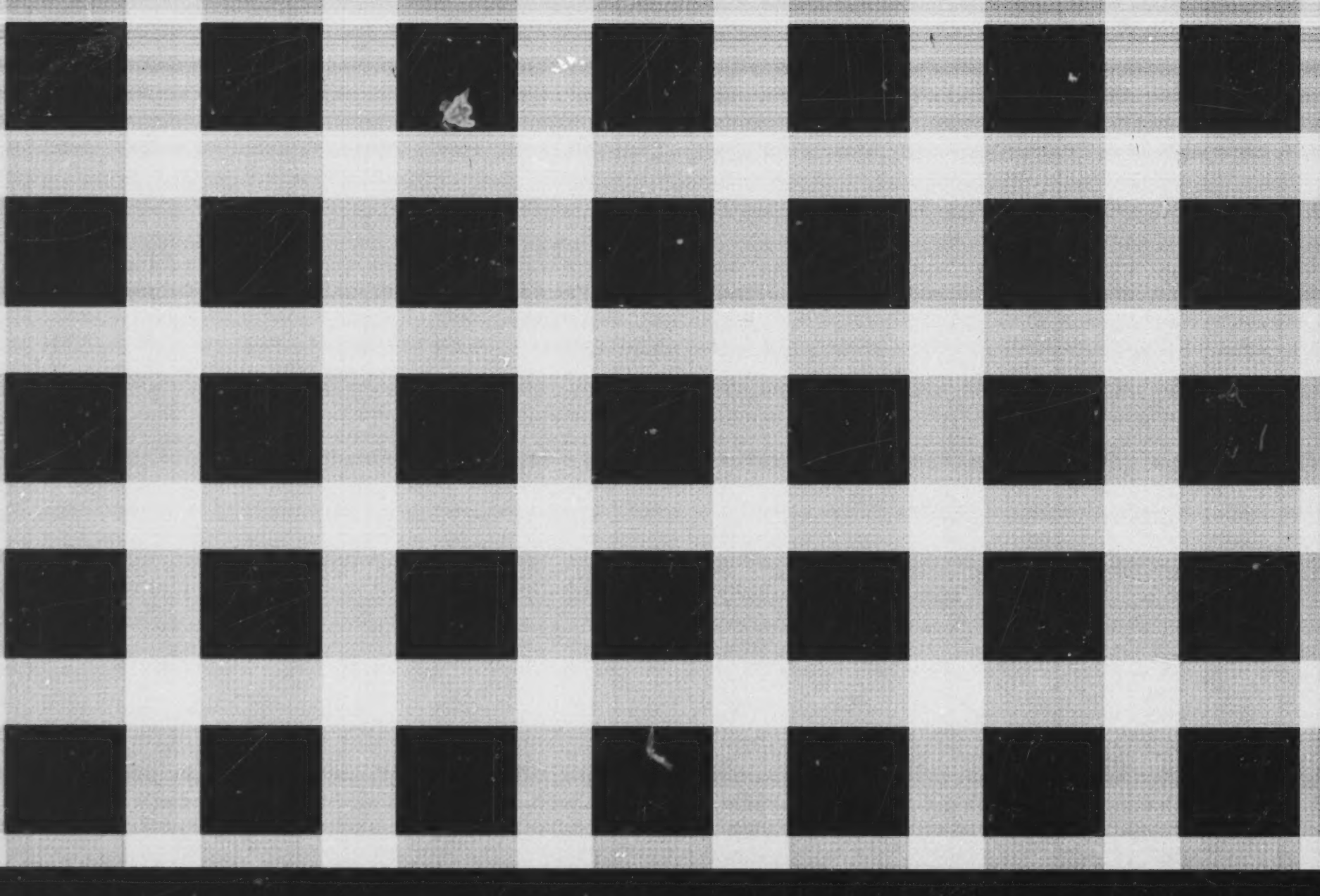
OCTOBER 2005